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No. 03-1396

In the Supreme Court of the United States

AMERICAN GI FORUM OF TEXAS, *ET AL.*,
Appellants,

v.

RICK PERRY, GOVERNOR OF TEXAS, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Does Section 2 of the Voting Rights Act provide a cause of action based solely on allegedly discriminatory intent, such that plaintiffs can prevail even without proving the required effect on the opportunity to elect?

2. Appellants' claim focused on a seven congressional-district region of the State that is 58 percent Latino and in which six of the seven districts are performing Latino districts. Did the district court err in concluding that a seventh Latino seat—which would have given 100 percent of the seats in that region to the 58 percent of its voters who are Latino—was not needed to achieve proportionality?

3. Did the district court make an erroneous factual determination when it found that Appellants' demonstrative Plan 1385C would not afford greater electoral opportunity to Latinos than would the legislatively enacted Plan 1374C?

4. Did the district court err as a matter of law when it refused to maximize the number of Latino districts by replacing the State's plan with a demonstrative plan that would have spread out Latino population such that, the district court found, the plan would not have afforded greater electoral opportunity than the State's plan?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities v

Statement of the Case 1

Argument 4

The Questions Presented Are Insubstantial 6

I. The District Court's Finding That Appellants' Plan Did Not Satisfy *Gingles* Was Not Clearly Erroneous 7

A. The District Court Properly Found That Latinos Were Not Sufficiently Numerous and Compact To Form Seven Effective Districts 8

1. Appellants' plan would spread Latinos too thin to be politically effective 8

2. Appellants' plan would be less effective because of a lack of compactness in its districts 9

B. The District Court Properly Considered Effectiveness When Evaluating Appellants' Demonstration Plan 9

II. The District Court Correctly Evaluated Proportionality 10

A. The District Court Rightly Found That Latinos Were Proportionately Represented in the Challenged Area 10

1. Adding a seventh district in South and West Texas would be disproportional 11

2. Section 2 does not require maximization 12

3. Because Appellants focused their claim on South and West Texas, that region was the proper frame of reference for proportionality . 12

B. The District Court's Findings Also Support Substantial Proportionality for Latinos on a Statewide Basis 14

C. Other Facts Bearing on the Totality Confirmed That the State's Districts Were Not Dilutive 15

D. Appellants' Complaints About the District Court's Proportionality Analysis are Misplaced 16

III. The District Court Correctly Rejected Appellants' Section 2 "Intent" Argument Under Both the Facts and the Law 17

A. The District Court Found That Old District 23 Was Not a Latino-Opportunity District, Contrary to Appellants' Thesis That One Had Been "Dismantle[d]." 18

B. Allegations of Discriminatory Intent Do Not, Taken Alone, Satisfy Section 2 19

C. The District Court's Factual Findings Would Preclude a Finding of Discrimination Even Under Pre-1982 Law 21

D. Appellants Have Not Shown Discriminatory Intent Under the Modern Constitutional Test 23

Conclusion 26

Appendix A:
Balderas v. Texas, No. 6:01-CV-158, slip op. (E.D.Tex. Nov. 14, 2001) (per curiam), *aff'd mem.*, 536 U.S. 919 (2002) 1a

Appendix B:
Plan 1385C Map (GI Forum Trial Exh. 2) 14a

Appendix C:
Plan 1385C Summary Page (Excerpt from GI Forum Trial Exh. 49) 15a

TABLE OF AUTHORITIES

Cases **Page**

Balderas v. Texas, No. 6:01-CV-158,
(E.D. Tex. Nov. 14, 2001) (per curiam),
aff'd mem., 536 U.S. 919 (2002) 2, 5

Bush v. Vera, 517 U.S. 952 (1996) 23-25

Cano v. Davis,
211 F.Supp.2d 1208 (C.D. Cal. 2002),
aff'd mem. 507 U.S. 1100 (2002) 20

City of Mobile v. Bolden,
446 U.S. 55 (1980) 19

DeBaca v. County of San Diego,
794 F.Supp. 990 (S.D. Cal. 1992),
aff'd 5 F.3d 535 (9th Cir. 1993) 20

Easley v. Cromartie,
532 U.S. 234 (2001) 23

Garza v. County of Los Angeles,
918 F.2d 763 (9th Cir. 1990) 20

Georgia v. Ashcroft,
539 U.S. 461 (2003) 6

Growe v. Emison,
507 U.S. 25 (1993) 8

Hunt v. Cromartie,
526 U.S. 541 (1999) 25

Johnson v. De Grandy,
512 U.S. 997 (1994) 6, 8-14, 17

Miller v. Johnson,
515 U.S. 900 (1995) 23, 24

Personnel Administrator of Massachusetts v. Feeney,
442 U.S. 256 (1979) 21, 22

Shaw v. Hunt, 517 U.S. 899 (1996) 23, 24

Shaw v. Reno,
509 U.S. 630 (1993) 6, 23, 24

Thornburg v. Gingles,
478 U.S. 30 (1986) 20

Turner v. Arkansas,
784 F.Supp. 5[illegible] (E.D. Ark. 1991),
aff'd 504 U.S. 952 (1992) 19

Village of Arlington Heights v. Metropolitan Housing Development Corporation,
429 U.S. 252 (1977) 21-23

Voinovich v. Quilter,
507 U.S. 146 (1993) 7, 19

Washington v. Davis,
426 U.S. 229 (1976) 21

Constitutional Provisions, Statutes, and Rules

42 U.S.C. §1973(a) 20

42 U.S.C. §1973(b) 19, 21

SUP. CT. R. 18.6 1

SUP. CT. R. 18.12 26

Other Authorities

Act of Aug. 6, 1975, Pub. L. No. 94-73,
§206, 89 Stat. 402 (1975) (amended 1982) 19

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MOTION TO AFFIRM

Pursuant to Supreme Court Rule 18.6, Appellees the State of Texas, Texas Governor Rick Perry, Texas Lieutenant Governor David Dewhurst, Texas House Speaker Tom Craddick, and Texas Secretary of State Geoffrey S. Connor (collectively, "the State") move to summarily affirm the judgment of the three-judge court on the ground that the arguments presented are so insubstantial as not to warrant further argument. SUP. CT. R. 18.6.

STATEMENT OF THE CASE

In 2001, Texas was awarded two new congressional seats to increase to thirty-two its delegation in the House of Representatives. J.S. App., at 3.[1] When the Legislature deadlocked, a federal three-judge court stepped in to draw a remedial plan for the State to accommodate these two new seats

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1. Appellants' jurisdictional statement will be cited as "J.S." and their appendices as "J.S. App." The State's appendices will be cited as "App."

(Plan 1151C). J.S. App., at 4. In that litigation, numerous plaintiffs vigorously contested the appropriate contours of that new map.

Included among those plaintiffs were Appellants Simon Balderas, Gilberto Torres, and part of Texas LULAC, who brought claims under Section 2 of the Voting Rights Act, arguing that the State should be required to draw seven Latino-opportunity congressional districts along the Texas-Mexico border. J.S. App., at 4. Those claims were unanimously rejected by the district court, which concluded that:

> "[a]s for the proposed Latino opportunity districts, the evidence shows that the Latino population is not sufficiently compact or numerous to support another, effective, majority Latino citizenship district in . . . South Texas. We find that under the totality of the circumstances, the failure to create seven such districts will not prevent full and equal Latino participation in the political process." App., at 12a.

Those plaintiffs filed a jurisdictional statement, and the district court's decision was summarily affirmed by the Court. *See Balderas v. Texas*, No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 14, 2001) (per curiam) (App. A), *aff'd mem.*, 536 U.S. 919 (2002); *see also* J.S. App., at 73 (discussing relationship between 2001 claims and 2003 claims).

In 2003, the Texas Legislature enacted a congressional redistricting plan (Plan 1374C). J.S. App., at 5. Appellants again brought suit, advancing the same position as before—that Section 2 requires that seven Latino-opportunity districts be drawn along the Texas-Mexico border.

Appellants' claims concern that region of Texas extending along the Texas-Mexico border, which the parties and the three-

judge court have generally referred to as "South and West Texas."[2] While in the State as a whole Latinos are approximately 22 percent of the citizen voting-age population, in the challenged region—South and West Texas—Latinos comprise 58 percent of the citizen voting-age population.[3] J.S. App., at 64. This region covers seven equipopulous congressional districts. *See* J.S. App., at 64.

Appellants claim that Section 2 requires that all seven of the congressional districts in South and West Texas be drawn as Latino-opportunity districts. J.S., at 73. To that end, Appellants offered a demonstrative plan focused exclusively on the South and West Texas area (Plan 1385C, or the demonstrative plan) that shows seven districts with a nominal majority of Hispanic citizen voting-age population. *See* App. B, at 14a (map); App. C, at 15a (summary table); *see also* J.S. App., at 73. The proposed additional "seventh" district would be Congressional District 23.

The district court heard evidence about District 23's performance under the prior court-drawn plan, under the State's plan, and under the demonstration plan. The court concluded that, under the court-drawn 2001 plan, "Congressional District 23 was not an effective minority opportunity district." J.S. App., at 81. In its prior form, it "had a bare majority of Hispanic citizen voting age population" and was not electing the Hispanic candidate of choice, instead electing an Hispanic Republican, Henry Bonilla, from 1992 through 2002. J.S. App., at 67, 68. These factual findings contradict Appellants' characterization of District 23 as having been

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2. At times, this region is referred to as "South Texas." *E.g.*, J.S., at 5 ("area of South Texas congressional districts"); J.S., at 7.

3. Appellants do not challenge the district court's use of citizen voting-age data. J.S. App., at 80 n.133 (noting that all other circuits that have addressed the question for Latinos have used such data).

an "opportunity district" before 2003. *Cf.* J.S., at 6 (suggesting the State's map "eliminated [District 23] as an opportunity district").

The district court also considered District 23 under the State's plan, concluding that—just as under the prior court-drawn plan—it is not a Latino-opportunity district. J.S. App., at 84. As it was still located in South and West Texas, District 23 retained a majority Hispanic total population and voting-age population.[4] But it no longer had its former nominal majority of Hispanic citizen voting-age population. J.S. App., at 68.

The changes in District 23 were produced through the political process of redistricting. As the three-judge court found, "the Legislature sought to apply to South and West Texas its primary partisan goal" while avoiding other violations of the law. J.S. App., at 68.

The three-judge court explained how the political goal of aiding the incumbent Representative for District 23, Congressman Bonilla, interacted with the demographics of the region. "The record presents undisputed evidence that the Legislature desired to increase the number of Republican votes cast in District 23 to shore up Bonilla's base and assist in his reelection." J.S. App., at 68. To increase that base, the district was expanded north to take in approximately 100,000 people who largely voted Republican. J.S. App., at 68. To equalize population in the district, the lines were contracted along the southern end of the district by moving the boundary within Webb County, removing approximately 100,000 people (many of whom were Latino) who largely voted Democratic. J.S. App., at 68.

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4. The demography of the border region makes it unsurprising that one of the people involved in the redistricting process might indicate that the various configurations he saw for District 23 each had a majority total population of Latinos. *Cf.* J.S., at 7.

The district court heard evidence about the split in Webb County, including evidence about why the State had chosen to split the county and how it had drawn the particular district lines. "The State presented undisputed evidence that the Legislature changed the lines of Congressional District 23 to meet the political purpose of making the district more Republican and protecting the incumbent, Congressman Bonilla. Plaintiffs agree that the primary purpose of this change was political and concede that there is a strong correlation between Latino and Democratic voters." J.S. App., at 109-110.

On the basis of this testimony, the district court found that "the State provided credible race-neutral explanations for Plan 1374C's county cuts . . . The legislative motivation for the division of Webb County . . . was political." J.S. App., at 111-112. The district court found that the line drawn through Webb County "in part used the interstate highway as a district boundary, deviating where necessary to achieve population balance." J.S. App., at 112. The district court ultimately found that there was "credible testimony that the numerous decisions embodied in the location of each district line combined the broad political goal of increasing Republican seats with local political decisions that are the most traditional of districting criteria." J.S. App., at 113-114.

ARGUMENT

This case raises no new questions of fact or law. Indeed, the Court has rejected substantially the same claim before, from essentially the same Appellants. In 2001, some of these Appellants sought a seventh Latino opportunity district, but the district court rejected that claim. *See* App. A, at 10a ("The Balderas plaintiffs argue that the congressional plan must contain seven Latino registration majority districts . . . ."). This Court summarily affirmed. *See Balderas v. Texas*, 536 U.S. 919 (2002) (mem.).

THE QUESTIONS PRESENTED ARE INSUBSTANTIAL

This is a routine Section 2 dilution case in which the district court evaluated Appellants' evidence and found it lacking. Appellants suggest that this appeal implicates *Shaw v. Reno*, 509 U.S. 630 (1993) (racial gerrymandering), and *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (Section 5 preclearance). *See* J.S., at 2, 13. But Appellants do not claim that their evidence could meet the exacting *Shaw*-line of cases, and the Texas congressional districts have already been precleared. Instead, they offer a straightforward Section 2 case. And the district court's factual findings against that case are entitled to substantial deference and render this appeal factbound and of limited application.

Appellants' theory to bypass those factual findings would stretch Section 2 beyond any viable limit by turning it into a maximization rule.[5] Their premise is that, once a protected group reaches majority status in a particular region, the Act entitles the group to control *all* the congressional seats within that region. That result would contravene the goals of the Act and violate the Court's precedents holding that the Voting Rights Act was designed to facilitate equal participation, not to provide political advantage. The Court accordingly rejected such a maximization rule in *Johnson v. De Grandy*, 512 U.S. 997 (1994), and it should summarily affirm here.

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5. Appellants' suggestion that resolution of this appeal is somehow "critical to Congress's fruitful debate on reauthorization of the Voting Rights Act" is simply misplaced. *See* J.S., at 1. Only Section 5 of the Voting Rights Act requires reauthorization in 2007. This is not a Section 5 case, and the district court's judgment in no way modifies the Court's recent statement of Section 5 law in *Georgia v. Ashcroft*, 123 S.Ct. 2498 (2003).

Appellants also argue that pure discriminatory intent—which the district court concluded was *not presented* on this record—could prove a violation of Section 2 without regard to results. That question was settled by Congress's amendment of the Voting Rights Act in 1982, which transformed Section 2 into a results-centered statute. *See Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) ("[W]here such an effect has not been demonstrated, § 2 simply does not speak to the matter."). The district court's finding under the totality of the circumstances was not clearly erroneous, and its judgment should be summarily affirmed.

I. THE DISTRICT COURT'S FINDING THAT APPELLANTS' PLAN DID NOT SATISFY *GINGLES* WAS NOT CLEARLY ERRONEOUS.

The district court resolved the totality of the circumstances against Appellants, finding on this record that drawing seven Latino-opportunity districts in South and West Texas would not increase Latino political opportunity. J.S. App., at 89. In so finding, the court compared Appellants' claims to similar claims brought by certain of these Appellants in 2001. J.S. App., at 73.

Nothing relevant to Appellants' claims has changed since 2001. Obviously, the geography has not changed. And the applicable census numbers from the 2000 census—the use of which Appellants do not challenge—remain unchanged. The only new information was additional census data relating to citizenship rates, which the panel concluded "does not alter the validity of [its earlier] finding." J.S. App., at 73-74.

Appellants offer a demonstration plan (Plan 1385C) that purports to draw an additional Latino citizen voting-age majority district in South and West Texas. J.S. App., at 73. But based on its evaluation of the trial testimony and other evidence, the district court found that "[t]he record . . . does not show that [Appellants'] demonstration plan would satisfy *Gingles*." J.S. App., at 74.

A. The District Court Properly Found That Latinos Were Not Sufficiently Numerous and Compact To Form Seven Effective Districts.

The court found against Appellants on the first prong of *Gingles*, the requirement that a demonstration plan "creat[e] more than the existing number of *reasonably compact* districts with a *sufficiently large* minority population to elect candidates of its choice." *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994) (emphasis added); *see also Growe v. Emison*, 507 U.S. 25, 40 (1993) (noting that this prong is "needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district").

Although Appellants' demonstration plan has *nominal* citizen-majorities of Latinos, it can achieve that mathematical mark only by spreading the Latino population out in a way that the district court found would create majorities too thin and too geographically dispersed to be politically effective. Thus, the district court found as a factual matter that the demonstration plan would not meet the first precondition of *Gingles* because "[t]here is neither sufficiently dense and compact population in particular to support such a configuration." J.S. App., at 89.

1. Appellants' plan would spread Latinos too thin to be politically effective.

The district court found that some of Appellants' demonstration districts had majorities too thin to be effective. In particular, District 28 in the demonstration plan would have only a 50.3 percent citizen voting-age majority of Latinos. J.S. App., at 80. Of the seven nominal-majority districts in the demonstration plan, five would have a citizen voting-age majority below 60 percent. J.S. App., at 80. The district court considered testimony from experts for both plaintiffs and the State indicating that, because of low turn-out rates, more than mere majorities are needed for politically

effective Latino-opportunity districts. J.S. App., at 81 n.134. For those reasons, the court found that Latino citizens of voting age were not sufficiently numerous in the challenged area to form seven effective districts. J.S. App., at 89.

2. Appellants' plan would be less effective because of a lack of compactness in its districts.

The district court also found that Appellants' demonstration districts were not compact enough to allow such thin majorities to be politically effective. J.S. App., at 89. In making this finding, the district court compared the compactness of the demonstration districts to the State's districts, determining that the demonstration districts were relatively more "unusual" in shape than the State's districts and that the joining together of "disparate and distant communities" in the demonstration plan would render it more difficult for Latinos to exercise political power given the smaller majorities they would hold in when spread among seven districts. J.S. App., at 74 n.125.

B. The District Court Properly Considered Effectiveness When Evaluating Appellants' Demonstration Plan.

Appellants wrongly criticize the district court for evaluating the effectiveness of the demonstration districts rather than simply relying on raw statistics about whether those districts could have a bare majority of Latino citizens. J.S., at 25-28. But there is no reason to find the first *Gingles* precondition to be so mechanical, and even if it were, the ultimate totality of the circumstances would encompass precisely the factors considered by the district court. *See De Grandy*, 512 U.S., at 1011 (indicating that the totality inquiry must make precisely such "judgments resting on comprehensive, not limited, canvassing of relevant facts").

As Appellants admit, "the District Court based its 'totality of the circumstances' conclusion on a finding that not all seven of the

districts proposed by [Appellants] offered Latinos the opportunity to elect their candidate of choice." J.S., at 26. Given that the demonstration plan spread out the Latino population more thinly, and into districts that were less compact and cohesive, the three-judge court's totality finding is well supported on this record.

II. THE DISTRICT COURT CORRECTLY EVALUATED PROPORTIONALITY.

As a part of its examination of the totality of the circumstances, the three-judge court followed the dictate of *De Grandy* and considered whether the minority group had already achieved substantial proportionality of representation. J.S. App., at 76. The court did not treat proportionality as necessarily dispositive, but instead as "only one factor to be used in assessing the totality of circumstances to determine if unlawful vote dilution has created an 'unequal political and electoral opportunity' for a protected class." J.S. App., at 77 n. 127 (citing *De Grandy*, 512 U.S., at 1022). Based on the entire record—including proportionality—the district court found that the totality of the circumstances did "not show a violation of § 2 in South and West Texas under Plan 1374C." J.S. App., at 101.

A. The District Court Rightly Found That Latinos Were Proportionately Represented in the Challenged Area.

In the relevant area, South and West Texas, there can be no question that Latinos have substantial proportionality. Because Latinos comprise 58 percent of the relevant population and, under the State's plan, can effectively control six of the seven congressional seats (84 percent), the district court found that "proportionality is satisfied as to that area." J.S. App., at 79.

1. Adding a seventh district in South and West Texas would be disproportional.

If an additional Latino-opportunity district were created in South and West Texas, it would give 58 percent of the relevant population control of 100 percent of the congressional districts. That sort of "maximization" of potential majority-minority districts was explicitly rejected in *De Grandy* as an improper use of Section 2. 512 U.S., at 1022 (holding that the district court erred in not "address[ing] the statutory standard of unequal political and electoral oportunity," and that it "reflected instead a misconstruction of §2 that equated dilution with failure to maximize the number of reasonably compact majority-minority districts.").

Indeed, the breadth of Appellants' claims mirrors a hypothetical the Court gave in *De Grandy* of how a failure to consider proportionality would render Section 2 "absurd." *De Grandy*, 512 U.S., at 1016-17. The Court hypothesized a State with voters spread evenly among ten districts, in which 40 percent of the voters were members of a minority group. *Id.* While a proportional number would be four districts, under a maximization rule that group could achieve control of up to seven districts—a level of representation 75 percent more than proportionality. *Id.* The Court concluded that such a disproportionate result cannot follow from the Act because "it would be absurd" to read Section 2 to provide "a minority group with effective political power 75 percent above its numerical strength." *Id.*, at 1017.

The statistics in South and West Texas bring the *De Grandy* hypothetical to life. Latinos make up 58 percent of the relevant population for a region with seven congressional districts. An arithmetically proportional level of representation would be four of those seven seats. The State's plan creates six effective Latino opportunity districts. And Appellants ask instead that Latinos

control all seven districts. This would create exactly the same "absurd" situation warned against in *De Grandy*. *Id.*, at 1017.

2. Section 2 does not require maximization.

The Court has concluded that requiring maximization is inconsistent with "the very purpose of the statute."[6] *De Grandy*, 512 U.S., at 1016-17. The State's alleged "[f]ailure to maximize cannot be the measure of § 2." *Id.*, at 1008.

Thus, in *De Grandy* the Court held that, when a group has achieved opportunity substantially proportional to its share of the relevant population, that fact weighs heavily in the totality of circumstances. 512 U.S., at 1000. In *De Grandy*, a group of Hispanic voters in Dade County, Florida, sought greater influence in the state legislative districts in that county. *Id.* In response, Florida argued that its districts allowed Hispanic voters to elect candidates of their choice proportionate to their share of Dade County's voting-age population. *Id.*, at 1006. The Court agreed, holding that even if plaintiffs could otherwise show vote dilution under *Gingles*, there would be no Section 2 liability where members of the protected minority group "can be expected to elect their chosen representative in substantial proportion to their percentage of the area's population." *Id.*, at 1008. That is already the case for South and West Texas.

3. Because Appellants focused their claim on South and West Texas, that region was the proper frame of reference for proportionality.

Appellants also dispute whether proportionality should be assessed on a statewide basis or for the particular area used for the

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6. "[R]eading § 2 to define dilution as any failure to maximize tends to obscure the very purpose of the statute." *De Grandy*, 512 U.S., at 1016-17.

Gingles factors. The district court held that it did not need to resolve that question because—under either measure—the State's plan achieved substantial proportionality. *See* J.S. App., at 78-79.

Moreover, this case does not raise the theoretical question of whether statewide proportionality could ever appropriately be considered because, here, Appellants focused their claim on only one region of the State. Just as the Court in *De Grandy* held that it did not need to reach that question because the Section 2 claim at issue related only to a particular region, Appellants' Section 2 claim expressly focuses on a single region of the State. *Compare* J.S. App., at 78-79 (noting that Appellants' *Gingles* challenge was so limited), *with* 512 U.S., at 1021-22 (noting that plaintiffs in *De Grandy* had chosen to focus on a specific area).

On its face, Appellants' demonstrative plan was limited to South and West Texas, covering only the seven congressional districts in question. *See* App. B, at 14a. Examining Appellants' map of the area covered by their demonstrative plan makes its regional focus plain. Appellants address only South and West Texas, and proposed no congressional districts whatsoever outside that region. Likewise, the statistical summary for the demonstrative plan—submitted by Appellants as Trial Exhibit 49, App. C, at 15a—explicitly defines its scope: "Districts in Plan: 7." Accordingly, Appellants proposed no remedy beyond South and West Texas.

Because the *Gingles* factors cannot be satisfied outside of that region, South and West Texas is the area for which the corresponding totality of circumstances—including its proportionality component—must be assessed. In *De Grandy*, the Court held that where the parties agreed in the district court on the area covered by the Section 2 claim, that area controls proportionality: "Thus, we have no occasion to decide which frame of reference should have been used if the parties had not apparently

agreed in the District Court on *the appropriate geographical scope for analyzing the alleged § 2 violation and devising its remedy*." *De Grandy*, 512 U.S., at 1022 (emphasis added). Likewise, Appellants do not advance any claim on appeal that goes beyond the region of South and West Texas,[7] nor did they prove any broader claim in the court below. The district court therefore correctly concluded that "[i]f South and West Texas is the only area in which *Gingles* is applied and can be met, as Plaintiffs argue, it is also the relevant area for measuring proportionality." J.S. App., at 79.[8]

B. The District Court's Findings Also Support Substantial Proportionality for Latinos on a Statewide Basis.

In the alternative, the district court also addressed the question of whether the State's districts could meet proportionality on a *statewide* basis. J.S. App., at 79-83. It concluded that—looking beyond the mathematical measures, as *De Grandy* counseled, 512 U.S., at 1023—the record suggested substantial proportionality on a statewide basis.

Statewide, the existing districts provide six Latino-opportunity districts—a number one below what would be expected for pure "arithmetic proportionality," which would assign the group a share of the congressional delegation precisely matching its share of the

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7. Even their second Question Presented, which uses the phrase "a different area of the state," concerns only Districts 23 and 25, J.S., at i, 23-38, both of which are in South and West Texas.

8. That Appellants would prefer that proportionality be assessed statewide does not vitiate their framing the case before the trial court as a *Gingles* challenge to South and West Texas. And, of course, it is too late on appeal for them to expand their challenge to the entire State; to do so would have required that they put on evidence and prove up a plan statewide, not simply limited to the seven districts in question.

relevant population.[9] But the district court emphasized that having only six Latino-opportunity districts did not necessarily mean that the State's plan was not substantially proportional. J.S. App., at 80 ("*De Grandy* emphasizes . . . that the inquiry is not merely mathematical."). As other factors weighing in the totality, the district court noted that Latinos held substantial influence in at least two other districts that were not Latino-opportunity districts. *See* J.S. App., at 79 (discussing District 29 in Houston, where Latinos comprise approximately 47 percent of the relevant population, and District 23, where the incumbent is an Hispanic Republican who has historically attracted substantial Hispanic cross-over support).

C. Other Facts Bearing on the Totality Confirmed That the State's Districts Were Not Dilutive.

The district court found that the totality of the circumstances favors the State's plan. J.S. App., at 79-80. Because turn-out rates and participation levels for Latinos are relatively low, the district court observed that districts with a bare Latino majority are less likely to be effective. J.S. App, at 80-81. Based on substantial expert testimony, the district court noted that the more accurate metric for an effective Latino-opportunity district would be a slight *super*majority of Latino citizen voting-age population rather than a bare majority. J.S. App., at 80-83 & nn.134-35.

Using that metric, the district court found that the totality of circumstances suggested that the State's plan would produce a higher level of Latino opportunity with its six slight-supermajority-districts than would Appellants' demonstration plan that nominally had seven bare-majority districts. J.S. App., at 82-83. "The

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9. The district court indicated that "arithmetic proportionality" on a statewide basis would correspond to seven of Texas's thirty-two congressional districts because Latinos represent 22% of the citizen voting-age population of the State. J.S. App., at 76.

legislative plan and the demonstration plan . . . have the same number of districts in which Latinos equal or exceed 55% of the citizen voting age population. The legislative plan has one more district in which the Hispanic citizen voting age population exceeds 60% than the demonstration plan." J.S. App., at 82-83.

The district court's totality finding was also supported by other evidence, including "detailed regression analyses of election data by different experts," J.S. App, at 91-95, "witnesses familiar with the areas covered," J.S. App., at 95-96, and "testimony of elected officials from the districts at issue," J.S. App., at 99. On that detailed record, the court explicitly found that "[t]he totality of facts and circumstances, including those pointing to proportionality, as well as past and predicted election outcomes and evidence as to the likely functioning of the newly configured districts, does not show a violation of § 2 in South and West Texas under Plan 1374C." J.S. App., at 101.

D. Appellants' Complaints About the District Court's Proportionality Analysis are Misplaced.

Appellants accuse the district court of using its effectiveness analysis to create "a cap on the proportionality" that a minority group could achieve. J.S., at 28. That argument misses the point of the district court's focus on effectiveness. If districts are not *effective* districts, they will not improve the political opportunity held by Latinos and are not required to be created by the Voting Rights Act. In that regard, the district court's treatment of effectiveness in its totality analysis mirrors the Court's description in *De Grandy* of the first *Gingles* factor as "requir[ing] the possibility of creating more than the existing number of reasonably

compact districts with a sufficiently large minority population to elect candidates of its choice." 512 U.S., at 1008.[10]

Appellants also attempt to characterize the State's proportionality argument as involving a district "located in one area of the state" being traded for a district "in a different part of the state." J.S., at i. But to the extent that criticizes the doctrine of proportionality, Appellants' argument is foreclosed by *De Grandy*'s recognition of proportionality as a proper aspect of the totality of the circumstances. 512 U.S., at 1013-14. And on this record, there is only one "part of the state" at issue: South and West Texas.

Appellants focused their Section 2 claims on that region and sought a remedy only for that region. *See, e.g.*, App. B, at 14a (showing the area covered by their demonstration plan). The district court found that six of the seven districts in that region were Latino-opportunity districts. *See* J.S. App., at 79. As the district court explained, "[i]n this case, by contrast, in South and West Texas, six *Gingles* Latino citizen voting age population majority districts could be and were drawn. The Legislature did not place the lines of those districts in parts of the State where the Gingles requirements were not satisfied; the problem present in *Shaw II* is not involved in this case." *See* J.S. App., at 88.

III. THE DISTRICT COURT CORRECTLY REJECTED APPELLANTS' SECTION 2 "INTENT" ARGUMENT UNDER BOTH THE FACTS AND THE LAW.

Appellants argue that Section 2 protects against allegedly "discriminatory intent" irrespective of the lack of discriminatory

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10. In *De Grandy*, the Court declined to consider the question of whether to apply a supermajority requirement to Latino districts. 512 U.S., at 1008-09. The Court did not need to reach that theoretical question because proportionality resolved the case. *Id.*, at 1009. For the same reason, there is no cause to reach the question here.

results. This argument fails for at least four reasons. First, Appellants build their argument on the false premise that old District 23 was a Latino-opportunity district, contrary to the factual finding of the district court. Second, Appellants' argument depends on a reading of Section 2 that is at odds with the 1982 amendments to the Voting Rights Act and the Court's subsequent interpretation of those amendments. Third, the district court's factual findings demonstrate that, even under pre-1982 voting-rights law, Appellants failed to make their case. And fourth, the district court's factual findings demonstrate that Appellants failed to prove discrimination under the modern constitutional standard.[11]

A. The District Court Found That Old District 23 Was Not a Latino-Opportunity District, Contrary to Appellants' Thesis That One Had Been "Dismantle[d]."

Appellants frame their argument on the assumption that old District 23 had been a Latino-opportunity district. J.S., at i (framing the question as the State's "dismantl[ing]" a district); J.S., at 6 ("[T]he State eliminated Congressional District 23 as an opportunity district for Latinos. . . ."). But Appellants' theory is contrary to the district court's factual finding. After considering testimony and evidence about the status of former District 23, the district court concluded that it "was not an effective minority opportunity district." J.S. App., at 81. As it was drawn, it "had a bare majority of Hispanic citizen voting age population" and had not elected the Hispanic candidate of choice, instead from 1992 through 2002 electing an Hispanic Republican, Henry Bonilla. J.S. App., at 67, 68.

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11. The State addresses this constitutional argument for completeness, although it does not appear to be fairly included in Appellants' Questions Presented. *See* J.S., at i (framing question presented in terms of "section 2 of the Voting Rights Act").

B. Allegations of Discriminatory Intent Do Not, Taken Alone, Satisfy Section 2.

Appellants' "intent" argument cannot be squared with the statutory text. Section 2 requires proof "on the totality of circumstances" that "the political processes . . . are not equally open . . . in that [class] members *have less opportunity* to participate in the political process and *to elect* representatives of their choice." 42 U.S.C. §1973(b) (emphasis added). The statutory focus is not intent, but results.

The Court has agreed with that plain reading. Section 2 "focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the *effect* to denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 *simply does not speak to the matter*." *Voinovich*, 507 U.S., at 155 (emphases added). It "speaks only of results and makes no distinction between the intentional and unintentional causes thereof." *Turner v. Arkansas*, 784 F.Supp. 553, 569 (E.D. Ark. 1991), *aff'd* 504 U.S. 952 (1992); *accord* S. Rep. No. 417 at 36, *reprinted in* 1982 U.S.C.C.A.N. 177, 214 (indicating that an inquiry into intent "asks the wrong question").

Because Appellants' "intent" argument conflicts with the Act's current text, they erroneously suggest that the Court look to guidance in pre-1982 cases that were decided under a *different* wording of the Voting Rights Act. Before 1982, Section 2 required plaintiffs to prove that a particular practice had been enacted "*to* abridge or deny" the right to vote. *See* Act of Aug. 6, 1975, Pub. L. No. 94-73, §206, 89 Stat. 402 (1975) (amended 1982) (emphasis added). When the Court held that this provision required proof of discriminatory intent, *see City of Mobile v. Bolden*, 446 U.S. 55, 62-63, 66-67 (1980), Congress responded by amending the statute. Thus, in 1982 Congress amended the Voting Rights Act to

delete the language regarding purpose and replace it with language focusing on results. 42 U.S.C. §1973(a) ("results in a denial or abridgement").

Congress chose to shift the focus of Section 2 from intent to results. The "'intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities.'" *Gingles*, 478 U.S., at 71 (citation omitted). "In amending § 2, Congress rejected the requirement . . . that § 2 plaintiffs must prove the discriminatory intent of state or local governments in adopting or maintaining the challenged electoral mechanism." *Id.* Rather than ask about intent, "[a]mended § 2 asks instead 'whether minorities have equal access to the process of electing their representatives.'" *Id.*, at 72.

The Court's entire post-1982 Section-2 jurisprudence presupposes that the focus is on results, not intent. *Gingles* establishes three "preconditions" to suit that must be met, in addition to an examination of the "totality of the circumstances." 478 U.S., at 50-51. While intent might conceivably play some role in that "totality," the Act does not give it a transcendent role superseding the other requirements.

For the contrary proposition, Appellants rely heavily on a Ninth Circuit decision, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), which they cite for the proposition that "section 2 prohibits intentional vote dilution." J.S., at 14. But *Garza* itself recognized that for a Section 2 claim, "[e]ven where there has been a showing of intentional discrimination, plaintiffs must show that they have been injured as a result."[12] *Garza*, 918 F.2d at 771. To

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12. *See also Cano v. Davis*, 211 F.Supp.2d 1208, 1249 (C.D. Cal. 2002) (holding that *Garza* requires proof of injury), *aff'd mem.* 507 U.S. 1100 (2002); *accord DeBaca v. County of San Diego*, 794 F.Supp. 990, 993-94 (S.D. Cal. 1992) (same), *aff'd* 5 F.3d 535 (9th Cir. 1993).

measure that "result," *Garza* looks to the text of Section 2, *see id.* (citing 42 U.S.C. §1973(b))—the very provision whose text Appellants seek to avoid.

C. The District Court's Factual Findings Would Preclude a Finding of Discrimination Even Under Pre-1982 Law.

Even if Appellants' theory were not foreclosed by the statute, Appellants could not prevail because, on this record, they failed their own proffered test. They propose construing Section 2 to follow the standard of intent that the Court applied in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), to a constitutional claim involving a zoning policy.[13] J.S., at 14-15.

Arlington Heights, in turn, cited *Washington v. Davis*, 426 U.S. 229 (1976), to establish that unconstitutional intent required proof that an "invidious discriminatory purpose was a motivating factor." *Arlington Heights*, 429 U.S., at 266. That showing required evidence of invidious intent—not mere awareness of race.[14] *Davis*,

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13. Appellants' embrace of this *older* constitutional standard is perplexing because Appellants so fervently object to the district court's decision to look at the Court's *current* voting-rights jurisprudence when assessing intent. Appellants' theory seems to be that Congress—by *removing* any mention of purpose from Section 2—also froze in place then-existing intentional-discrimination law as a separate mechanism to prove a Section 2 violation. This would directly contravene the motivation for the 1982 amendments, which was to free Section 2 from that very intent standard.

14. *Personnel Administrator of Massachusetts v. Feeney* states the rule even more clearly: "'Discriminatory purpose' . . . implies than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an indentifiable group." 442 U.S. 256,

426 U.S., at 240-42. As the three-judge court noted, "the Supreme Court has acknowledged that states will always be aware of race when they draw district lines." J.S. App., at 103. Indeed, given that Texas is a covered jurisdiction, the Voting Rights Act required that some consciousness of race to ensure that any plan complied with Section 5.[15]

On its record, the *Arlington Heights* Court held that the plaintiffs did not meet the standard of proving invidious intent rather than mere awareness and so directed that judgment be entered against the plaintiffs. *Id.*, at 270-71. Likewise, the district court here found that there had been no racial discrimination in the drawing of District 23. J.S. App., at 111 ("[C]redible testimony from the State's witnesses demonstrated that factors at the heart of traditional districting criteria, including political goals, predominately influenced the numerous decisions embodied in the location of each district line.").

Comparing the record before the three-judge court with that evaluated in *Arlington Heights* confirms the propriety of the district court's factual finding. In *Arlington Heights*, there was evidence that "some of the opponents . . . who spoke at the various hearings might have been motivated by opposition to minority groups." *Id.*, at 269. The Court held that evidence of discriminatory intent insufficient: "the evidence does not warrant overturning the . . . findings . . . . [Plaintiffs] simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." *Id.*, at 270.

Likewise, Appellants' evidence in this case is equally, if not more, deficient. They cite snippets of testimony from two non-

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279 (1979) (citation omitted).

15. On December 19, 2003, the Department of Justice precleared Plan 1374C, conclusively determining that the plan did not retrogress.

defendants indicating—at most—consciousness of race on the part of map drawers. J.S., at 21. As in *Arlington Heights*, the district court that heard this testimony made a factual finding that there was "credible testimony that the numerous decisions embodied in the location of each district line combined the broad political goal of increasing Republican seats with local political decisions that are the most traditional of districting criteria." J.S. App., at 113-114.

Arlington Heights also puts to rest Appellants' attempt to shift the burden of proof to the State. The evidence here—which is merely of race-consciousness rather than animus—is less compelling as to invidious discrimination than was the evidence in *Arlington Heights*, and there the Court did not shift the burden. *Arlington Heights*, 429 U.S., at 270-71 & n.21. Thus, even under the standard proposed by Appellants, they cannot prevail.

D. Appellants Have Not Shown Discriminatory Intent Under the Modern Constitutional Test.

The district court properly applied the Court's constitutional jurisprudence of racial discrimination when assessing intent *See* J.S. App., at 103-04 (citing *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993)). In that process, the district court properly kept the burden of proof on the plaintiffs. *See* J.S. App., at 104 (citing *Vera*, 517 U.S., at 958-59; *Miller*, 515 U.S., at 916).

As the district court explained at length, under this Court's precedents,

> "States are not required to ignore race; indeed, the Supreme Court has acknowledged that states will always be aware of race when they draw district lines. The factor of race or ethnicity may be considered in the process as long as it does not predominate over traditional race-neutral redistricting

> principles. The fact that race is given consideration . . . and the fact that majority-minority districts are intentionally created does not suffice to trigger strict scrutiny." J.S. App., at 103-04 (citing *Miller*, 515 U.S., at 916; *Shaw*, 509 U.S., at 646; *Shaw v. Hunt*, 517 U.S., at 907; *Bush v. Vera*, 517 U.S., at 962).

On the full record, the district court found that the new lines in District 23 were most logically and credibly explained as a political decision. "The State presented undisputed evidence that the Legislature changed the lines of Congressional District 23 to meet the political purpose of making the district more Republican and protecting the incumbent, Congressman Bonilla. Plaintiffs agree that the primary purpose of this change was political and concede that there is a strong correlation between Latino and Democratic voters." J.S. App., at 109-110.[16]

The district court also properly rejected the expert conclusions offered by Appellants, which failed to account for the effect of politics. *See* J.S. App., at 109 n.201. The Court's equal-protection jurisprudence recognizes that sometimes race and party are strongly correlated, and that politically-motivated district lines do not in themselves implicate *racial* intent under the Constitution. "[A]

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16. In their Jurisdictional Statement, Appellants seize upon a reference to an "additional political nuance" that District 23 would retain a majority of Latino voting age population, J.S. App., at 85-86, to assert that the district court found "dual racial and non-racial motivations," J.S., at 10. That is not what the district court found. In the very same paragraph of the district court's opinion, it explained the Legislature's "dual goal[s]" in crafting District 23: (1) "increasing Republican seats in general," and (2) "protecting Bonilla's incumbency in particular." J.S. App., at 85. Both of these "dual goal[s]" were political, and there was no racial intent. Given the demographics of South and West Texas, there was at most awareness of race.

jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be Black Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551-52 (1999). Here, the district court found at most such a constitutionally permissible relationship. The decision to split Webb County "affected voters whose ethnicity and political partisanship voting achieved strong correlation." J.S. App., at 110. The district court rejected any inference that this county split had any predominant racial motivation. *See* J.S. App., at 109-110. "[T]he State provided credible race-neutral explanations for Plan 1374C's county cuts . . . The legislative motivation for the division of Webb County . . . was political." J.S. App., at 111-112.

The district court was able to evaluate the testimonial snippets cited in the jurisdictional statement in their full context, concluding that "[t]he record does not present evidence of statements by legislators or staff supporting the claim that ethnicity predominated in the redistricting process. To the contrary, the emails, statements, and other communications from those involved in the process reveal that politics predominated." J.S. App., at 118.

Appellants incorrectly suggest that the State should have been required to draw district lines "based on a precinct-level analysis of voter support for Congressman Bonilla." J.S., at 21. That argument—that the State must look to partisanship to the exclusion of all other redistricting factors—has no support.

To the contrary, the State's refusal to use census block data except where necessary for population equality underscores that District 23 was not being drawn based on race. In *Bush v. Vera*, the Court inferred that race had predominated in part because the State used block-level data (which broke down population by race) rather than data available at other levels (which provided election return data). 517 U.S. 952, 961-62 (1996). By contrast, the district court

found here that "the data the Legislature used in the districting process does not support a claim of unwarranted reliance on ethnicity to make the line-drawing decisions." J.S. App., at 118. Unlike in *Vera*, in this case "the State presented undisputed testimony that the map drawers examined race at the block level in South and West Texas region on only a few occasions in order to avoid splitting minority communities." J.S. App., at 118.

As the district court found, the specific divisions in Webb County were not based on race. Those lines "in part used the interstate highway as a district boundary, deviating where necessary to achieve population balance." J.S. App., at 112. On the whole, the district court found credible the State's explanation of "the numerous decisions embodied in the location of each district line" as reflecting both political considerations and "local political decisions that are the most traditional of districting criteria." J.S. App., at 113-114.

CONCLUSION

The Court should summarily affirm the judgment of the three-judge court. SUP. CT. R. 18.12.

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